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8 Servicing, LP (f/k/a Countrywide
Home Loans Servicing L.P.), ReconTrust
9 Company, N.A., Bank of America, N.A., and
Bank of New York Mellon (erroneously
0 named as Bank of New York)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PETRA MARTINEZ,
Plaintif
v.

7 AMERICA'S WHOLESALE LENDER, *et al.*,
8 Defendants.

Case No.: 09-cv-05630-WHA

**OPPOSITION TO PLAINTIFF'S
EX PARTE MOTION TO
CORRECT RECORD**

Date: None Set
Time: None Set
Courtroom: 9, 19th Floor
Judge: Hon. William H. Alsup

1 **I. PLAINTIFF'S EX PARTE MOTION SHOULD BE DENIED**

2 Plaintiff Petra Martinez ("Plaintiff") has filed an *ex parte* motion ("Motion") to modify the
 3 Court's record. In particular, she seeks an order that would: (1) allow her to upload a new
 4 complaint; and (2) strike the complaint and other papers that were submitted as exhibits
 5 ("Exhibits") to the November 30, 2009 Notice of Removal ("Notice of Removal") by defendants
 6 Countrywide Home Loans, Inc. (d/b/a America's Wholesale Lender), BAC Home Loans
 7 Servicing, LP (f/k/a Countrywide Home Loans Servicing L.P.), ReconTrust Company, N.A.,
 8 Bank of America, N.A., and Bank of New York Mellon (erroneously named as Bank of New
 9 York) ("Defendants"). For two reasons, Plaintiff's Motion should be denied.

10 First, Plaintiff has not complied with Local Rule 7-10. Under that rule, any party that
 11 wishes to file an *ex parte* motion without an order by the Court may file the motion "only if a
 12 statute, Federal Rule, local rule or Standing Order authorizes the filing . . . and the party has
 13 complied with the applicable provisions allowing the party to approach the Court on an *ex parte*
 14 basis." Civ. L.R. 7-10. In addition, the motion must cite "to the statute, rule or order which permits
 15 the use of an *ex parte* motion to obtain the relief sought." *Id.* Plaintiff, however, has not cited a
 16 single statute, rule, or order that permits the use of an *ex parte* motion to "correct the record."
 17 (Motion at 1.) Simply put, Plaintiff makes no showing of the emergency entitling her to *ex parte*
 18 relief as opposed to one sought on a noticed motion. For this reason alone, the Motion should be
 19 denied.

20 Second, Plaintiff argues that this Court's record should be changed because the Exhibits
 21 "were somehow altered from their original state" and "does not reflect the complaint which Plaintiff's
 22 attorney's office caused to be filed at the Superior Court for the County of Monterey" (Motion at
 23 1.) For two reasons, Plaintiff's argument makes no sense.

24 To start with, according to the superior court clerk, the Exhibits were filed by Plaintiff *i.e.*,
 25 not Defendants or any other party. On December 21, 2009, Defendants' counsel contacted the
 26 superior court clerk and asked whether that court's records identified the party that filed the
 27 Exhibits. (Lui-Kwan Decl. ¶ 4.) According to the clerk, Plaintiff filed the Exhibits on August 12,
 28 2009. (*Id.*) The clerk's records are consistent with the Exhibits' cover pages, which are file-

1 stamped on August 12, 2009, and contain signature lines bearing Plaintiff's name. (*Id.*, Ex. 1.)

2 Thus, Plaintiff's suggestion that neither she nor her attorneys filed the Exhibits is nonsensical.

3 In addition, the Exhibits were properly filed with this Court as attachments to the Notice
 4 of Removal. At the time of removal, Defendants were required to file a notice "with a copy of all
 5 process, pleadings, and orders served upon each defendant or defendants in such action." 28
 6 U.S.C. § 1446(a). To ensure that this Court had a complete set of the state-court file as of the
 7 time of removal (and not simply the summons and complaint that Plaintiff had purportedly
 8 served), Defendants hired a third-party vendor on November 25, 2009 to retrieve the entire state-
 9 court file from the Superior Court. (Lui-Kwan Decl. ¶ 2.) The vendor delivered the file to
 10 Defendants' counsel on November 30, 2009. (*Id.* ¶ 3.) Defendants attached the entire file as an
 11 exhibit to their Notice of Removal. (*Id.* ¶ 3; Notice of Removal ¶ 2 ("Attached hereto as Exhibit A
 12 are copies of all process, pleadings, and orders filed in the State Court Action, including the
 13 Summons and Complaint?").) Thus, the Exhibits were part of the state-court file, and therefore
 14 properly became part of this Court's file upon removal.

15 **II. CONCLUSION**

16 It is not clear why Plaintiff has filed a request to modify this Court's record (or why she
 17 filed her request on an *ex parte* basis). She does not contend that the Exhibits contain private
 18 information; nor does Plaintiff identify who (if not herself) could have filed the documents. The
 19 Motion is, simply put, a bizarre waste of paper, as well as this Court's and Defendants' time and
 20 resources. Plaintiff may have filed her request to manufacture a procedural defect that she could
 21 cite in a future motion to remand this case to state court. Indeed, she may have filed the request
 22 on an *ex parte* basis since her deadline for filing a motion to remand is on December 30, 2009,
 23 approximately one week from now. *See* 18 U.S.C. 1447(c). If that is the case, and Plaintiff is
 24 trying to generate a basis for remanding the action, her work is for naught. The Ninth Circuit has
 25 found that defects in removal procedure (such as Plaintiff appears to be generating here) are not
 26 jurisdiction defects, and may therefore be waived or corrected. *See Fristor v. Reynolds Metals*
 27 *Co.*, 615 F.2d 1209, 1212-13 (9th Cir. 1980).

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1 Whatever her purpose for filing the Motion, Plaintiff has not demonstrated that she is
2 entitled to the relief she seeks. Accordingly, her *ex parte* Motion should be denied.
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4 DATED: December 21, 2009

Respectfully submitted,

5 SEVERSON & WERSON
6 A Professional Corporation

7 By: _____ /s/ Kalama M. Lui-Kwan
Kalama M. Lui-Kwan

8 Attorneys for Defendants
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